

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

Criminal Appeal No. 989 of 2001

Court No.3

Old No. 1456 of 1983

Maqsood son of Mohd. Shafi, resident of village Kanwali, P.S. Kotwali

District Dehradun

.....Appellant.

Versus

State of U.P.

.....Respondent.

Hon'ble Irshad Husain, J.

This is an appeal against the judgment and order dated 19-5-1983 passed by the then Sessions Judge Dehradun in Session Trial No. 97 of 1981, convicting the appellant U/S 25 (1) of the Arms Act and sentencing him to undergo R.I. for a period of six months.

The appellant was charge sheeted along with three others for offence punishable U/Ss 399/402 IPC and for offence punishable U/s 25(1) of the Arms Act. All the four accused persons were acquitted of the charge U/Ss 399/402 IPC because the evidence of the prosecution was not found cogent and reliable in regard to the involvement of one Teeka Ram, as the offence punishable U/S 399/402 IPC require the presence of at least five persons.

According to the prosecution on 23-7-1981 S.I. Diwan Singh (P.W.1) and S.O. Mobin Ahmad (P.W.2) along with nine other police personnel were on petrol duty at about 8 p.m. and on an information from a informant that some miscreants were sitting at a culvert with fire arms in order to commit high-way robbery, encircled that place by constituting two policy parties and after being satisfied from the conversation of the miscreants challenged them and arrested four of them, whereas fifth named as Teeka Ram was able to fled away from there. The incident took place at about 11 p.m. in the night between 23/24-7-1981 at Lal Tappar within the circle of P.S. Dehradun. The search of the appellant resulted in recovery of country made pistol, Ex-5, a cartridge, Ex-6 in the barrel, and another cartridge, Ex-7 from his pocket. After completion of the formalities of the preparation of the memo of arrest and recovery the case was registered at the Police

Station. As mentioned above after investigation charge sheet was submitted against the appellant also.

The prosecution examined S.I. Diwan Singh (P.W.1) and S.O. Mobin Ahmad (P.W.2) in evidence they stated that constable Hari Om was sent to the forest out post to procure public witnesses and since no one was available there, they constituted two police parties and on reaching the pointed place at the culvert posted each of the two parties on either side of the culvert, one in the east and other in the west. These witnesses claimed to have heard the conversation of the miscreants that they are there to commit the highway robbery and that they would leave the place only after finishing their job. On being convinced P.W.2 challenged the miscreants. They started running from there but four of them were arrested, one of which was appellant Maqsood. His search resulted in the recovery of the above mentioned fire arms vide memo, Ex.Ka.5

The investigation of the case was entrusted to S.I. N.K.Tyagi (P.W.3) who completed formalities of the investigation and filed charge sheet against other culprits and the appellant. He also proved the sanction Ex.Ka.13 given by the District Magistrate Dehradun on 8.9.1981 U/S 39 of the Arms Act for prosecution of the appellant for offence punishable U/s 25 of the Arms Act. The learned Sessions Judge on the basis of the appreciation of the evidence found the evidence of the prosecution reliable in regard to the arrest and recovery of the fire arm from the possession of the appellant and accordingly convicted and sentenced him as mentioned above.

Heard Sri Rajendra Singh learned counsel for the appellant and learned A.G.A. for the State and carefully perused the record.

Learned counsel for the appellant submitted that the learned Sessions Judge had not found evidence of the prosecution reliable about the presence of fifth miscreant and that this aspect of the matter was sufficient to create doubt in the veracity of the witnesses about the occurrence itself by the learned Sessions Judge fell in error in not taking into account this aspect of the matter and wrongly placed reliance on the evidence about the arrest of the appellant and recovery

from him of the country made pistol and cartridges. Learned counsel also argued that absence of any public witness also tell upon the reliability of the prosecution evidence which consists of only the evidence of police personnel. Having considered the broad features of the case, the submissions of the learned counsel has substance. In the face of the facts of the case the rival argument of the learned A.G.A. that evidence of the police personnel was sufficient to bring home guilt to the appellant can not safely be accepted.

The reasons are that firstly the prosecution did not examine constable Hari Om in evidence to support the claim that no public witness could be made available from the nearby forest out-post. The information was given by the informer at about 8 p.m. and this not being the odd hours of the night, it will not be safe to accept the claim that no public witness or even a forest personnel was available at the forest out post, to be taken as the witness of the occurrence. In a situation like this there was need to carefully scrutinize the evidence of the police witnesses which it appear that the learned Sessions Judge failed to do and thereby placed reliance on the evidence of the police witnesses.

On being carefully scrutinized the claim of the police witnesses P.W.1 and P.W.2 do not repose confidence because it is highly improbable that movement of as many as eleven police personnel in and around the culvert on the road where the alleged miscreants have assembled did not cause any noise to give alarm to those miscreants. It is also further highly improbable that in a situation like this the police personnel could have without raising any noise, positioned two police parties on either side of the culvert at place "B" and "C" as shown in site plan Ex.Ka.10 and that too quite close to the culvert and be able to hear conversation which took place among those miscreants. The incident took place in the dark hours of the night and the police personnel were carrying torches which were seen and seized vide memo, Ex.Ka.11 and it was not possible to take position by the police parties in the bushes without lighting these torches at that time as and when the torches were to be lighted if the miscreants were there near

the culvert they would not have remain stationed there to be later on arrested after being challenged by the S.O. Mobin Ahmad (P.W.2). The facts and circumstances as borne out from the evidence of P.W.1 and P.W.2 create grave suspicion in their claim and it could not be safely accepted that the miscreants including the appellant were arrested in the manner as alleged and recovery of fire arm was effected from his possession. In the peculiar circumstances of the case when the evidence of the prosecution was not found reliable in regard to the commission of the offence punishable U/Ss 399/402 IPC the above factors were apparent form the evidence of P.W.1 and P.W.2 to further show that the evidence was also not reliable in regard to the arrest of other miscreants including the appellant and recovery of fire arm from him. The appellant should have been given benefit of doubt in regard to the arrest and recovery also.

Considering the aspects I feel no hesitation in coming to the conclusion that the learned Sessions Judge fell in error in placing reliance on the evidence of the prosecution and coming to the conclusion that the charge against the appellant U/S 25(1) of the Arms Act was proved beyond doubt. The evidence in fact is not sufficient and reliable to prove the guilt of the appellant and therefore he is entitled to be held not guilty and to be acquitted of the charge U/S 25(1) Arms Act.

The appeal therefore succeed and is accordingly allowed. The judgment and order dated 19-5-1983 of conviction and sentencing the appellants U/S 25(1) Arms Act is set aside. The appellant is on bail. He need not surrender. His bail bonds are cancelled and sureties discharged.

(Irshad Hussain, J.)

Dated: 7-8-2003

ISB